

Prevention of Child Pornography Bill

Proposed Committee Stage Amendments

At the 9th Bills Committee Meeting held on 9th January 2003, the Administration was asked to provide the Bills Committee with the draft Committee Stage Amendments (CSAs) on proposed changes discussed in previous meetings. A copy of the draft CSAs is at Annex.

2. Draft CSAs on Clauses 2(1), 4(3), 4(5), 4(6), 4(7), 4(8) and 14 are provided to reflect the changes proposed in the papers entitled “Administration’s Response to Major Suggestions/Issues Raised by Members at Previous Meetings” and “Administration’s Response to Issues Raised at the Meeting on 29 November 2002”, taking into account Members’ comments.

3. The main purposes of the above CSAs are summarized as follows:

- (a) Clause 2(1) – to replace “appears to be” with “is depicted as being” in the definitions of “child pornography” and “pornographic depiction”.
- (b) Clause 4(3) – to revise the defence provision applicable to possession offence under Clause 3(3) to clarify the extent of efforts that a defendant should have made for preventing himself from coming into possession of the child pornography or destroying it to establish this defence. The “for the avoidance of doubt” part mentioned in Para. 6 of the paper entitled “Administration’s Response to major suggestions/Issues Raised by Members at Previous Meetings” is taken out as “he endeavoured to destroy it” is replaced by “he took reasonable and practical steps to destroy it” in the attached draft CSA. Just as “taking reasonable and practical steps to ascertain the age”, the defendant may not actually be able to ascertain it.
- (c) Clause 4(5) – to provide a defence for defendants under Clause 3(3) on belief on reasonable grounds that the depicted person was not a child and not depicted as such. We have taken away the additional limb referring to “3 identical copies” and replace it with “the defendant possessed the child pornography for his reasonable personal use” to plug possible loophole.

- (d) Clause 4(6) – to re-arrange the sequence of the sub-clauses of the original Clause 4(5) to make it more logical and make some drafting improvements .
 - (e) Clause 4(7) and (8) – to provide a lower standard of proof in respect of defence clauses 4(2), 4(3) and 4(5) when applied to possession offences and to state expressly that the standard of proof is on a balance of probabilities in other cases.
 - (f) Clause 14 (proposed s.138A(4)) – to replace the original two-tier definition with one single definition, that is, the one presently applicable to persons under 16 will be retained and made applicable to all persons under 18.
4. Minor amendments to Clauses 4(4), 5(5), 11(1) and 14 (proposed s.138A(5)) are also proposed and they are technical in nature.
5. Members are invited to comment on the draft CSAs above.

Security Bureau
January 2003

PREVENTION OF CHILD PORNOGRAPHY BILL

COMMITTEE STAGE

Amendments to be moved by the Secretary for Security

<u>Clause</u>	<u>Amendment Proposed</u>
2(1)	<p>(a) In the definition of "child pornography", in paragraph (a), by deleting "appears to be" and substituting "is depicted as being".</p> <p>(b) In the definition of "pornographic depiction", in paragraph (a), by deleting "depicts a person who is or appears to be engaged in explicit sexual conduct;" and substituting "of a person who is engaged in or is depicted as being engaged in explicit sexual conduct; or".</p>
4	<p>By deleting subclause (3) and substituting -</p> <p>"(3) It is a defence to a charge under section 3(3) for the defendant to establish that -</p> <p>(a) he had not asked for any child pornography and he could not have prevented himself from coming into possession of the child pornography by taking all reasonable and practicable steps for this purpose; or</p> <p>(b) he had not asked for any child pornography and, within</p>

a reasonable time after it came into his possession, he took all reasonable and practicable steps to destroy it."

4(4) By deleting "Without prejudice to subsection (2), it" and substituting "It".

4 By deleting subclause (5) and substituting -

"(5) It is a defence to a charge under section 3(3) for the defendant to establish that -

- (a) he possessed the child pornography for his reasonable personal use; and
- (b) he believed on reasonable grounds that the person pornographically depicted in the child pornography was not a child when the person was originally depicted and that the person was not depicted as a child.

(6) It is a defence to a charge under section 3 for the defendant to establish that -

- (a) he took all reasonable and practicable steps to ascertain the age of the person pornographically depicted in the child pornography when the person was originally depicted;

(b) in so far as the defendant was able to influence in any way how the person was depicted, he took all reasonable and practicable steps to ensure that the person was not depicted as a child; and

(c) he believed on reasonable grounds that the person was not a child when the person was originally depicted and that the person was not depicted as a child.

(7) Unless subsection (8) applies, a defendant is to establish any fact that needs to be established for the purpose of a defence under this section on a balance of probabilities.

(8) A defendant charged with an offence under section 3(3) is to be taken to have established any fact that needs to be established for the purpose of a defence under subsection (2), (3) or (5) if -

- (a) sufficient evidence is adduced to raise an issue with respect to the fact; and
- (b) the contrary is not proved by the prosecution beyond reasonable doubt."

5(5) By adding -

"vehicle" () does not include a military vehicle;".

11(1)(a) By adding "and" after the semicolon.

14 (a) By deleting the proposed section 138A(4) and substituting -

"(4) For the purposes of this section, to depict a person pornographically means -

(a) to visually depict the person who is engaged in or is depicted as being engaged in explicit sexual conduct; or

(b) to visually depict, in a sexual manner or context, the genitals or anal region of the person or, in the case of a female person, her breast,

but, for the avoidance of doubt, a depiction for a genuine family purpose does not, merely because it depicts any part of the body referred to in paragraph (b), fall within that paragraph."

(b) In the proposed section 138A(5), in the definition of "pornography", in paragraph (a), by deleting ", whether or not it is a depiction of a real person".